Supreme Court, U. S.
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No. 80-413

In the Supreme Court of the United States

October Term, 1980

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GREAT LAKES CARBON CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Urgent Deficiencies Act (28 U.S.C. §§2321 et seq.) requires that an action to set aside a final order of the Interstate Commerce Commission be brought against the United States of America when the Commission's Order arises from a referral to it of a question or issue by a United States District Court and when such action is brought before the referring court pursuant to the terms of Section 1336(b) of Title 28 of the United States Code.

2. Whether the failure to bring an action to set aside a final order of the Interstate Commerce Commission against the United States of America is a procedural defect fatal to the reviewing Court's jurisdiction.

3. Whether a judgment setting aside a final order of the Interstate Commerce Commission is void for the purposes of Rule 60(b)(4) of the Federal Rules of Civil Procedure when the action seeking to have the Commission's Order set aside has not been brought against the United States of America.

4. Whether a party can be held to have waived its remedy to have a void judgment set aside under Rule 60(b)(4) by its failure to raise the issue of the voidness of the judgment in a timely prosecuted appeal.

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THE KANSAS CITY SOUTHERN
RAILWAY COMPANY,
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vs.

GREAT LAKES CARBON CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, The Kansas City Southern Railway Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 16, 1980

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in *The Kansas City Southern Railway Company v. Great Lakes Carbon Corporation,* Case No. 79-1075, entered upon rehearing on June 16, 1980, has not yet been reported and appears in the Appendix hereto. Similarly, the opinion of the panel of the Court of Appeals, entered on September 24, 1979; and the Order of the

district court denying plaintiffs' motion under Rule 60(b)(4) and its final judgment, entered in *The Kansas City Southern Railway Company v. Great Lakes Carbon Corporation,* Civil Action No. 75-808C(3) appear in the Appendix. Both the initial and final decisions of the Interstate Commerce Commission, entered in I.C.C. Docket No. 36406, *Petition for Declaratory Order - Great Lakes,Carbon Corporation - Petroleum Coke,* also appear in the Appendix.

JURISDICTION

The judgment on rehearing of the Court of Appeals for the Eighth Circuit was entered on June 16, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§1336(b). *Interstate Commerce Commission Orders.*

> (b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the Court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

§2321(a) and (b). *Judicial Review of Commission's orders and decisions; procedure generally; process.*

> (a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulations, or order of the Inter-

state Commerce Commission shall be brought in the Court of Appeals as provided by and in the manner prescribed in Chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this Chapter.

§2322. *United States as party.*

All actions specified in Section 2321 of this title shall be brought by or against the United States.

Federal Rules of Civil Procedure Rule 60(b).

Relief from Judgment or Order.

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment,

order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This case arises out of a dispute between the parties as to the proper railroad freight charges due petitioner ("KCS") under its published tariff. KCS filed an action in the United States District Court (W.D. Mo.) for recovery of unpaid freight charges it claimed due from Great Lakes Carbon Corporation ("Great Lakes Carbon"). Jurisdiction was invoked under 28 U.S.C. §1337. Great Lakes Carbon in turn counterclaimed for recovery of charges it claimed to have overpaid KCS. Because the case involved issues of tariff interpretation and of the applicability and lawfulness of the railroad freight rates at issue, the trial court stayed the proceedings before it and directed the parties to seek a declaratory order from the Interstate Commerce Commission on these issues.

Pursuant to the court's directive, the parties filed their respective petitions for declaratory order with the Interstate Commerce Commission. Full proceedings were had before the Commission culminating in the final order

of the Commission, entered on October 7, 1977 in I.C.C. Docket No. 36406 (Petition for Declaratory Order - Petroleum Coke) and I.C.C. Docket No. 36406 (Sub-No. 1) (Petition for Declaratory Order - Kansas City Southern). In short, the Commission's final order upheld KCS' interpretation of the tariff and its application of the rates therein published.

Having obtained the declaratory order, the parties returned to the trial court which had referred the issues to the Interstate Commerce Commission. KCS filed its motion for summary judgment wherein it requested the court to enter a money judgment consistent with the Commission's order. Great Lakes Carbon, on the other hand, also filed a motion for summary judgment wherein it requested that the Court accept the Commission's tariff interpretation insofar as KCS' Complaint was concerned but that the court disregard that interpretation with respect to its counterclaim. Great Lakes Carbon neither brought this action to set aside the Commission's order against the United States of America nor did it seek joinder of the United States of America as an additional party defendant.

On April 25, 1978, the trial court entered its judgment sustaining KCS' motion for summary judgment on its Complaint but also sustaining Great Lakes Carbon's Summary Judgment Motion on its Counter-claim; the first consistent with the Interstate Commerce Commission's final order but the latter in contradiction thereto.

KCS did not timely appeal the trial court's judgment. However, on October 31, 1978, KCS filed a motion under Rule 60(b)(4) of the Federal Rules of Civil Procedure, seeking to have the judgment as to Great Lakes Carbon's Counter-claim set aside for the reason that the court lacked requisite jurisdiction to set aside the Commission's order for failure to join the United States of America as an

additional party defendant and that the judgment as to the counterclaim was thus void. By Order dated December 21, 1978, the trial court summarily denied the 60(b)(4) motion.

KCS appealed that order to the Eighth Circuit Court of Appeals. On September 24, 1979, a panel of that court reversed the trial court and remanded the case. However, upon rehearing, the court en banc entered its decision which is the subject matter of this petition.

REASONS FOR GRANTING PETITION

I. The Decision Conflicts With Decisions of Other Circuits As to the Proper Interpretation of the "Urgent Deficiencies Act" Requiring That the Conflict Be Settled by This Court.

The exclusive procedure for review of a final order of the Interstate Commerce Commission by a referring court is that set forth in the "Urgent Deficiencies Act" (28 U.S.C. §§2321 et seq.) *B. F. Goodrich Co. v. Northwest Industries, Inc.*, 424 F.2d 1349, 1353 (3rd Cir. 1970), certiorari denied, 400 U.S. 822. The remedy is so exclusive that the Commission's order cannot be attacked unless all the requirements have been met, including that of bringing the action against the United States of America. *Schwartz v. Bowman*, 244 F.Supp. 51 (D.C.N.Y. 1965), affirmed, 360 F.2d 211, certiorari denied, 385 U.S. 921. Failure to at least join the United States of America as an additional party defendant is a procedural defect fatal to the court's jurisdiction. *Schwartz v. Bowman, supra*, at 68.

The instant decision is in conflict with both the letter and the spirit of those rulings. It disregards the statutory scheme for review of Commission orders. It fails to recognize the Congressional intent that the United States par-

ticipate in such proceedings to preserve the public interest. In short, it will allow private litigants, through inadvertence or device, to disregard and thereby thwart the legitimate exercise by the Interstate Commerce Commission of its jurisdictional grant and the exercise of its function as a monitor of the public interest in the regulatory scheme. See: *State of North Dakota ex rel. Lemke v. Chicago & N.W. Ry.*, 257 U.S. 485, at 490, 42 S.Ct. 170, at 171 (1922). The decision at least requires review by this court. In reality, however, it so places in question the interpretation of the "Urgent Deficiencies Act" as to require resolution by this court.

II. The Decision so Countenances Unwarranted Acquisition and Exercise of Jurisdiction by the Trial Court As to Require Exercise by This Court of Its Supervisory Function.

When this court is presented questions involving the exercise by the lower federal courts of jurisdiction, it has a dual role: that of interpreter of the law and that of supervisor of the conduct of those lower federal courts. The instant case presents an issue as to the proper exercise of jurisdiction by a district court in an area in which that jurisdiction is clearly limited by statute. Insofar as the decision acquiesces in the district court's exercise of jurisdiction under questionable circumstances, guidance is needed from this court as to whether that activity was proper.

III. The Decision Renders Rule 60(b)(4) a Nullity Calling for Exercise by This Court of Its Powers of Supervision.

The decision holds that, even though the trial court may have erred in interpreting the statutory prerequisites

to its jurisdiction, it can rely upon that error as the basis for jurisdiction it otherwise does not possess. Thus, the Court of Appeals reasons, failure to raise that error on appeal lends it a legitimacy it would not otherwise have and grants the court jurisdiction otherwise unlawful.

With the sole exception of fraud in procurement, there exists no other reason for finding a judgment void than the trial court's lack of jurisdiction. Rule 60(b)(4) of the Federal Rules of Civil Procedure is an exceptional remedy which may be raised at any time, either before or after a judgment has become final. However, in this regard, the instant decision makes Rule 60(b)(4) unavailable to attack judgments void for lack of jurisdiction unless the issue is preserved for appeal or the motion is made prior to the judgment becoming final. As such, it renders Rule 60(b)(4) a nullity requiring this court's exercise of its supervisory powers to preserve the integrity of the rule and to govern the lower courts' administration of it.

IV. The Fact That Rehearing Was Granted and the Decision Rendered En Banc Demonstrates the Importance of the Issues and the Need for Review by This Court.

Rule 35(a) of the Rules of Appellate Procedure (F.R.A.P. Rule 35(a), 28 U.S.C.) provides:

> (a) *When Hearing or Rehearing in Banc Will be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Inasmuch as the Court of Appeals below granted rehearing, it must be assumed that the court considered that the proceeding involved questions of exceptional importance. But the question must be asked whether the decision adequately resolves that question. Four members of the court voted with the majority. Of these, three joined in the majority opinion and one concurred on unrelated grounds. Three members of the court expressed a very strong dissent. The decision involves such a division of opinions on issues of exceptional importance as to require ultimate resolution by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Fordyce & Mayne, G. Carroll Stribling, 120 South Central Avenue, Suite 1100, Clayton, Missouri 63105, Counsel for Respondent.

ROBERT K. DREILING
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Counsel for Petitioner

APPENDIX

MEMORANDUM

(Filed April 25, 1978)

This matter is before the Court upon defendant's motion for summary judgment on a counterclaim. The plaintiff, The Kansas City Southern Railway Company (KCS), filed a claim for undercharges against the defendant Great Lakes Carbon Corporation (Great Lakes). Great Lakes filed a counterclaim for overcharges against KCS.

At the request of both parties, the district court referred the matter to the Interstate Commerce Commission for adjudication. With regard to the plaintiff's claim, the Administrative Law Judge found that KCS applied the lawful tariff, and that its interpretation of the tariff was correct. However, the rate assessed by KCS was found to be unjust and unreasonable. Great Lakes' interpretation of the tariff, the basis of the counterclaim, was found to be incorrect. The ICC affirmed and adopted the decision of the Administrative Law Judge. Neither party exercised its statutory right of appeal to the ICC or the United States Court of Appeals. Both parties agree that the primary claim has been resolved and is no longer at issue. Under that claim plaintiff is entitled to a judgment of Twenty Nine Thousand, Eight Hundred Ninety Eight Dollars, Thirty Two Cents ($29,898.32).

The Court must now determine whether the decision of the ICC on the counterclaim is binding. KCS claims that it is and the doctrine of res judicata applies as the decision of the ICC was final. Great Lakes asserts that the decision of the ICC is not binding because the issue was not within the primary jurisdiction of that agency, that the doctrine of res judicata is irrelevant, and that the Court may consider the matter de novo.

What is involved here are shipments of petroleum coke from Chaison, Texas to Steeltown, Texas. KCS, the carrier, billed Great Lakes, the shipper, according to rates set out in the Texas-Louisiana Freight Bureau Tariff. Tariffs are promulgated under the auspices of the ICC. In this tariff there is no specific rate stated between Chaison and Steeltown. Item 216 permits the shipper to apply either the rate from Chaison to Port Arthur or the rate from Chaison to Beaumont.[1] Item 70 of the tariff states that the lower of any two rates must apply.

Section 2 of the tariff sets out specific commodity rates for petroleum coke from Chaison to Port Arthur. It is applicable (as KCS claims) unless there is another and lower rate which is also applicable to the Chaison to Steeltown movement. Section 4 of the tariff provides rates from Chaison to Beaumont. This rate is lower than the rate in §2. However, §4 does not apply specifically to petroleum coke, but to "freight all kinds":

> Rates referring hereto apply on FREIGHT ALL KINDS, consisting of a mixture of two or more commodities in the next phrase *except* as shown in NOTES 1 and 2 and as follows:
>
> Column 1 rates are in cents per car and apply on ALL COMMODITIES.
>
> Column 2 rates are in cents per car and apply on FREIGHT ALL KINDS and apply on import traffic. (emphasis added).

As "freight all kinds" is defined as a mixture of two or more commodities, a shipment consisting entirely of

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1. The item provides:

"Rates named in this tariff, as amended, applying on bulk shipments to Beaumont or Port Arthur, TX, for export on the KCS will also apply to Steeltown, TX, for export on the KCS."

petroleum coke does not fall under the first paragraph of §4. Great Lakes contends that the exception for all commodities plainly includes petroleum coke because the restriction that there be a mixture of two or more commodities does not apply. That is, the term "all commodities" includes shipment of a single commodity such as petroleum coke. The ICC disagreed and found that the §4 rate applicable to "all commodities" only applies to mixtures of two or more commodities, not shipments made entirely of petroleum coke.

The doctrine of primary jurisdiction determines whether a court or agency will initailly decide a particular question. It is not an abdication by the court to the agency; rather it is a deferral. It is often invoked when the specialized knowledge of the agency is necessary for a more informed determination of the issue. However, as stated in 3 K. Davis, Administrative Law §19.01 at p. 5 (1958):

> The principal reason behind the doctrine of primary jurisdiction is not and never has been the idea that "administrative expertise" requires a transfer of power from courts to agencies, although the idea of administrative expertise does to some extent contribute to the doctrine. The principal reason behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and of courts. Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agencies' specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agencies' continuous regulation may become the victims of uncoordinated and conflicting requirements.

Questions involving complex technical fact situations are often within the primary jurisdiction of agencies. Those questions involving legal issues are within the primary jurisdiction of the courts. If an agency decides a legal issue, not within its primary jurisdiction, the court is not bound by its determination. In this case, if the application of the tariff is determined to be a legal issue the court is free to follow or disregard the decision of the ICC. On the other hand, if this tariff interpretation involves technical issues, the commissioner's decision must be followed.

In transportation cases, the specialized knowledge of the ICC is often necessary to interpret ambiguous terms of a tariff or determine the reasonableness of rates. When words in a tariff are used in a technical sense, or extrinsic evidence is necessary to determine their meaning, the primary jurisdiction of the ICC is invoked. *Great Northern Railway Company* v. *Merchant's Elevator Co.*, 259 U.S. 285 (1922); *U.S.* v. *Western Pacific Railroad*, 352 U.S. 59 (1956). However, when words are used in an ordinary non-technical sense, involving only questions of law, the issue of tariff construction may be decided by the courts.

The terms to be construed here are "freight all kinds" and "all commodities". These words are used in an ordinary sense. Interpretation does not require the technical expertise of the ICC nor the gathering of extrinsic evidence. The opinion of the ICC is instructive:

> The difficulty with the shipper's position lies in the fact that the lower freight-all-kinds rates in section 4 of the tariff applied to mixtures, not shipments of single commodities such as petroleum coke. Also the specific commodity rates in section 2 of the tariff did not alternate with other rates. Taken together,

these provisions negate the shipper's arguments as to the applicability or violation of section 4 of the Act, and there was no violation of tariff circular 20 since only the rates in section 2 of the tariff were applicable to the traffic at issue. ICC Decision No. 36-406 (March 22, 1977).

In determining that the lower freight all kinds rate did not apply to shipments of single commodities the Administrative Law Judge did not draw on specialized knowledge of transportation matters. Extrinsic evidence was not gathered to aid an interpretation of the rates. Moreover, the purpose of the tariff is clear and may be construed without reference to underlying costs allocation factors. *Louisville & Arkansas Railway* v. *Expert Drum Co.*, 359 F.2d 311 (5th Cir. 1966).

The District Court may clearly interpret these nontechnical terms. As to the issue of whether the freight all kinds rate applies, the commission does not have primary jurisdiction and its decision is not binding upon this Court. Thus, Great Lakes' counterclaim will be considered on its merits.

Section 2 of the tariff is clearly applicable to the shipments in question as it sets out specific rates for petroleum coke. However, section 4 sets out lower rates and should be applied if it is found to include shipments of petroleum coke alone.

Section 4 applies to shipments of "freight all kinds". That term is defined as a mixture of "two or more commodities" and in general does not include shipments of petroleum coke, a single commodity. However, §4 contains an exception: Certain rates apply to "all commodities". At issue is whether "all commodities" is synonymous with "freight all kinds" and is limited to mixtures of

two or more commodities as well. It is this Court's opinion that it is not.

If it were intended that §4 rates were to apply only to "freight all kinds" there would be no need for an exception. Rules of statutory construction require that a word or phrase be interpreted to have some meaning if such an interpretation is reasonable. *Burrow* v. *Finch*, 431 F.2d 486 (8th Cir. 1970). Accordingly, the Court finds that the term "all commodities" is not the same as "freight all kinds" and includes shipment of petroleum coke. Thus, Great Lakes was overcharged and is entitled to summary judgment.

Dated this 25th day of April, 1978.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

ORDER

(Filed April 25, 1978)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment on plaintiff's complaint be and is GRANTED; and

IT IS FURTHER ORDERED that defendant's motion for summary judgment on defendant's counterclaim be and is GRANTED; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff have judgment against defendant on plaintiff's complaint in the amount of Twenty Nine Thousand Eight Hundred Ninety Eight Dollars and Thirty

Two Cents ($29,898.32) plus interest at the rate of six per cent (6%) per annum from August 31, 1974; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant have judgment against plaintiff on defendant's counterclaim in the amount of One Hundred Twenty Nine Thousand Twenty Six Dollars and Forty Nine Cents ($129,026.47) plus interest at the rate of six per cent (6%) per annum from the date of overpayment as reflected by joint Exhibit A; and

IT IS FURTHER ORDERED that the parties pay their own costs in this action.

Dated this 25th day of April, 1978.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

MEMORANDUM AND ORDER

(Filed December 21, 1978)

This matter is before the Court upon plaintiff's motion under Rule 60(b) of the Federal Rules of Civil Procedure for relief from the judgment and order of this Court filed April 25, 1978. Plaintiff in its motion contends that this Court did not have jurisdiction to try defendant's claims against plaintiff. The basis of plaintiff's motion addresses issues thoroughly considered by this Court in its opinion filed April 25, 1978, and from which plaintiff took no appeal.

After thorough reconsideration of the matter, this Court finds that plaintiff's motion is without merit. Consequently, plaintiff's motion for relief under Rule 60(b)(4) will be and is DENIED.

It is so Ordered.

Dated this 21st day of December, 1978.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

Exhibit "1"

INTERSTATE COMMERCE COMMISSION
INITIAL DECISION
No. 36406*

PETITION FOR DECLARATORY ORDER—
GREAT LAKES CARBON CORPORATION—
PETROLEUM COKE

(Service Date March 31, 1977)

1. Assailed rates and charges on shipments of petroleum coke in Texas from Chaison to Steeltown for export found to have been applicable, just and reasonable.

2. Sought rates and charges on export shipments of petroleum coke in Texas from Port Arthur to Steeltown found to have been applicable but not just and reasonable, to the extent they exceeded those in No. 1, above.

3. Proceedings discontinued.

Dickson R. Loos and *Barry Roberts* for the shipper, Great Lakes Carbon Corporation.

Robert K. Dreiling and *Robert E. Zimmerman* for the rail carrier, The Kansas City Southern Railway Company.

By Richard McG. Wilkins, Administrative Law Judge:

By a petition filed in the lead proceeding on August 2, 1976, the shipper, Great Lakes Carbon Corporation, requests a declaratory order from this Commission concerning the rates and charges on movements of petroleum coke in Texas, from Chaison to Steeltown, for export. By a petition filed on the same date in the embraced proceeding, the

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*Embraces Docket No. 36406 (Sub-No. 1), The Kansas City Southern Railway Company—Petition for Declaratory Order—Petroleum Coke.

rail carrier, The Kansas City Southern Railway Company, requests a declaratory order concerning the rates and charges on export movements in Texas from Port Arthur to Steeltown of the same commodity. Both proceedings result from an order dated June 3, 1976, by the United States District Court for the Eastern District of Missouri in Civil Action No. 75-808C(3) referring the matters therein to this agency for determination of the applicable rates and the justness and reasonableness thereof.

By orders dated August 11 and August 26, 1976, in the lead and embraced proceedings, respectively, the matters were placed under modified procedure. By order dated September 17, 1976, the two proceedings were consolidated. Statements and replies were duly filed by the parties; requested findings not adopted herein or reflected in the conclusions have been considered and found not justified. Short titles may be used in this report.

In the lead proceeding, at issue are alleged overcharges in violation of section 6 of the Interstate Commerce Act on 4,762 carloads moving from Chaison to Steeltown between June 2, 1972, and February 26, 1973. Violation of sections 1 and 4 of the Act, and of Tariff Circular No. 20, are also alleged. In the embraced proceeding, at issue are alleged undercharges on movement of 621 carloads in carrier-owned equipment from Port Arthur to Steeltown between May 6 and August 16 of 1974. In both of the proceedings, the shipper alleges that lower freight-all-kinds-rates applied and the carrier contends that higher specific commodity rates on petroleum coke applied. The shipper also contends that the latter, if applicable, were unjust and unreasonable.

The pertinent rail tariff provides, in section 2, non-alternating commodity rates on petroleum coke from the points here involved either directly, such as Chaison, or

through a rule applying the rate from the next point beyond in the case of Port Arthur. In item 216 of the tariff, single-line rates named to Port Arthur or Beaumont, Tex., for export also apply to Steeltown. The tariff also contains, in section 4, rates on freight all kinds, applicable to all commodities moving in mixtures of at least two commodities, from and to the points here involved, directly or by application of an intermediate point rule.

Petroleum coke is a solidified residue resulting from the destructive distillation of crude petroleum or residual petroleum liquids. In the lead proceeding, the coke moved from a refinery at Chaison. During the period involved, there was no rate published specifically for such movements, but, as noted above, the tariff provided for application to Steeltown of rates to Beaumont or to Port Arthur. The higher, non-alternating rate on petroleum coke from Chaison to Port Arthur was assessed; the shipper maintains that it was entitled to the lower freight-all-kinds rate named to Beaumont, under tariff item 70 making applicable that rate which results in the lower charge. Cases are cited by the shipper to the effect that any ambiguity should be resolved against the carrier.

In the lead proceeding, the carrier points out that item 70 of the tariffs provides for application of the lower rate in the same rate item, not in different sections of the tariff. Also, it is noted that both sections 2 and 4 of the tariff state that when there are rates published in section 2 only those rates will apply to given traffic, whether the points are specifically named or otherwise included. Further as noted above, the rates in section 4 of the tariff apply only to mixtures of two or more commodities.

By way of reply, in the lead proceeding, the shipper argues that it may elect either the rate from Chaison to Port Arthur in section 2 or the rate from Chaison to Beau-

mont in section 4 of the tariff, under item 216 of the tariff; otherwise, that provision is allegedly in conflict with the non-alternating provision in said section 2. *Calcium Carbonate Co.* v. *U.S.*, 256 F. Supp. 99, 102-3, is cited for the proposition that such conflicts are to be resolved in the shipper's favor. A conflict with Rule 7(b)(4), Tariff Circular No. 20, said to have the force and effect of law, is also alleged, *Calcium Carbonate Co.* v. *Missouri Pac. R. Co.*, 329 I.C.C. 458, 462-3, being cited. The shipper maintains that the freight-all-kinds rate applied to petroleum coke alone, because column 1 rates of tariff section 4 apply to all commodities.

In the embraced proceeding, the carrier assessed charges on multiple-car movements from Port Arthur to Steeltown, on the basis of rates for movements of petroleum coke from West Port Arthur to Steeltown in section 2 of the tariff, Port Arthur being an intermediate origin. The shipper paid on the rate basis for freight all kinds found in section 4 of the tariff, a basis which the carrier maintains does not apply by the non-alternating terms of both tariff sections. Court action by the carrier is to recover the difference between the amount assessed and the amount paid, namely $59,891.87. Several cases are cited by the carrier to the proposition that unnamed intermediate points are specific points for the application of rates under an intermediate point rule, including *Addition of Milwaukee to Chicago Group Rates—K.C.*, 318 I.C.C. 755, 758.

The shippers's position in the embraced proceeding is that while the rates in section 2 of the tariff were admittedly applicable to movements in private equipment, rates in section 4 of the tariffs were applicable to movements from Port Arthur to Steeltown in carrier-owned equipment. Only the movements in carrier equipment are at issue herein.

According to the shipper, the applicable charges are composed of a switching charge plus a rate in section 4 of the tariff on freight all kinds for movements from West Port Arthur to Atreco, Tex., the next point beyond Steeltown on a route allegedly available at the time the shipments moved. It is argued that the higher charge from a rate in section 2 of the tariff on shipments from West Port Arthur to Steeltown, over the route of movement, violates section 4 of the Act as a through rate higher than the aggregate of intermediate rates over a route then available. Numerous cases are cited to the effect that no tariff restriction of a rate can change its availability as an intermediate factor under section 4 of the Act, and that violation thereof requires reparations. The shipper also maintains that the rates relied upon by the carrier were unjust and unreasonable to the extent they exceeded those in section 4 of the tariff, allegedly so excessive as to constitute a prima facie showing of unreasonableness when compared with other carload rates for substantially similar movements in the same territory.

In the embraced proceeding, the carrier replies that the non-alternating provisions of both sections 2 and 4 of the tariffs preclude use of rates in the latter, which applied to all classes of commodities. Numerous cases are cited to the effect that mere violation of Tariff Circular No. 20 rules does not invalidate the tariffs or warrant reparations The carrier points out that an internediate point rule only applies where the point is intermediate over a feasible route; the route referred to by the shipper was beset by operational and environmental difficulties and has since been closed. Several cases are cited. The switching charge of the Southern Pacific Transportation Co. allegedly cannot be used as an intermediate factor, in which event it would have to be paid by the shipper, since it would not be ap-

plicable in the absence of a through rate; cited is *Brown-Strauss Corp.* v. *Alton R.R.*, 219 I.C.C. 69, 77.

It is the position of the carrier that the shipper's attempt to show the section 2 rates to be unjust and unreasonable through rate comparisons fails because only distances are compared. The carrier argues that a similarity of transportation conditions must be shown; several cases, including *Clements Foods Co. of Oklahoma City* v. *St. Louis-S.F. Ry.*, 315 I.C.C. 516, 517-518, are cited.

The carrier's evidence allegedly shows dissimilarities, including the fact that only the rates in section 2 of the tariff incorporate the Southern Pacific switching charge. The lower rate from Chaison resulted from a regular high volume of multiple-car traffic, and no petroleum coke has moved between the origins and destinations named in section 4 of the tariff for freight all kinds.

According to the carrier, the section 2 rate from Port Arthur to Steeltown was based upon the rate from West Port Arthur to Steeltown, less the amount of the reciprocal switching charge made by the Southern Pacific and absorbed by the carrier herein; however, a review of the tariffs reveals that a rate level was established specifically from Port Arthur to Steeltown subsequent to the movements herein. If the rate from Port Arthur is just and reasonable, then allegedly the basic rate must be so considered, but that does not follow in a reduction.

The carrier also discusses the shipper's claims as to rates on shipments in privately owned cars, but the shipper agrees that they are not before us. The carrier alleges that the correct charges were assessed, but not paid, on the involved traffic in the embraced proceeding. Both parties assert that a determination of the issues herein would in no way effect the quality of the human environment.

The difficulty with the shipper's position lies in the fact that the lower freight-all-kinds rates in section 4 of the tariff applied to mixtures, not shipments of single commodities such as petroleum coke. Also, the specific commodity rates in section 2 of the tariff did not alternate with other rates. Taken together, these provision negate the shipper's arguments as to applicability or violation of section 4 of the Act, and there was no violation of Tariff Circular 20 since only the rates in section 2 of the tariff were applicable to the traffic at issue.

The shipper maintains, in the embraced proceeding, that if the rates in section 2 of the tariff were applicable to movements from Port Arthur to Steeltown, then they were unreasonable when compared with other rates. The section 2 rates were about $40 to $50 per car higher than the rates on longer movements of petroleum coke from Chaison to Steeltown or Chaison to Port Arthur. The shipper's comparison with rates even lower on freight all kinds is not meaningful because those rates applied only to mixtures.

According to the carrier, section 2 rates, after the issue period, from Port Arthur to Steeltown reflect its absorption of a reciprocal switching charge. The rate level from Chaison to Steeltown allegedly resulted from a demonstrated, regular, high volume of multiple-car traffic; however, while this may explain some difference in rate levels, those rates were not limited to multiple-car movements. The carrier does not attempt to distinguish the rate from Chaison to Port Arthur in this regard. Also, none of these rates were for movements exceeding 20 miles in the same vicinity; compare *Fresh Meats from Davenport, Iowa, to Melbourne, Fla.*, 315 I.C.C. 621, 622. Conditions appear similar.

In view of the above, the Judge concludes and finds that the rates in section 2 of the rail tariff were applicable to the movements involved in both proceedings, but that in the embraced proceeding those rates applicable to movements from Port Arthur to Steeltown, to the extent they exceeded the rates on petroleum come from Chaison to Steeltown, were unjust and unreasonable. It is also found that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Accordingly, it is the ORDER of the Administrative Law Judge that these proceedings be, and they are hereby, discontinued, and that in the absence of a stay or postponement by the Commission, or the timely filing of an appeal, the effective date of this order shall be 20 days from the date served.

Dated in Washington, D.C., this 22nd day of March 1977.

By the Commission, Richard McG. Wilkins, Administrative Law Judge.

Robert L. Oswald
Secretary

(Seal)

Exhibit "2"

INTERSTATE COMMERCE COMMISSION
DECISION AND ORDER
No. 36406*

PETITION FOR DECLARATORY ORDER—GREAT LAKES CARBON CORPORATION—PETROLEUM COKE

(Service Date October 7, 1977)

In an initial decision served March 31, 1977, the Administrative Law Judge found that assailed rates and charges on export shipments of petroleum coke in Texas from Chaison to Steeltown were applicable, just and reasonable, but that those rates found applicable to export movements of petroleum coke from Port Arthur to Steeltown in the embraced proceeding were unjust and unreasonable to the extent they exceeded the rates on petroleum coke from Chaison to Steeltown.

On April 20, 1977, Great Lakes Carbon Corporation (Great Lakes) filed exceptions to the initial decision. On May 25, 1977, a petition for leave to late file a reply to the exceptions and the reply itself were filed by Kansas City Southern Railway Company (KCS). KCS initially sought to file a reply on May 20, 1977, based upon time periods in effect prior to the passage of the 4-R Act. KCS indicates that it now understands that section 303(b) of the 4-R Act, amending section 17 of the Interstate Commerce Act, has been construed to shorten the time period for filing exceptions (now designated as an appeal) from 30 to 20 days, and thus make the due date for a reply statement 10 days sooner than under former procedure. KCS indicates that it has discussed the request made in its petition with counsel for Great Lakes and that Great Lakes indicates it

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*Embraces Docket No. 36406 (Sub-No. 1), The Kansas City Southern Railway Company—Petition for Declaratory Order—Petroleum Coke.

would have no objection to granting the petition. Since the KCS reply statement would have been timely filed under former procedure and the effective date of the order adopting revised procedures to conform with the 4-R Act, Ex Parte No. 55 (Sub-No. 24), *Revised Rules of Practice*, I.C.C. (1977), is July 19, 1977, KCS's petition is granted and its reply statement is hereinafter made part of the record in these proceedings.

Embraced in the KCS reply statement is a motion to strike portions of Great Lakes exceptions statement for failing to state separately and number a particular contention as an exception pursuant to Rule 96(a) of the Commission's General Rules of Practice.[1] The motion to strike is denied. In the context of the arguments made by Great Lakes in its exceptions statement, it was unnecessary to state separately and number this particular contention as an exception.

The Great Lakes exceptions statement does not show any material errors in the Administrative Law Judge's statement and evaluation of the facts, conclusions of law, or findings, does not raise any matters of fact or law not adequately considered and properly disposed of in the report of the Administrative Law Judge, and does not require issuance of a report discussing the evidence submitted and the arguments advanced by the parties in light of the exceptions. Therefore, having considered the entire record, we find that the recommended decision is proper and correct in all material respects.

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1. Rule 96(a) has been replaced by Rules 97 and 98 in the *Revised Rules of Practice* adopted by the Commission in Ex Parte No. 55 (Sub-No. 24). The requirement to state and number separately is no longer a requirement in the revised rules. However, it is noted that KCS' reply statement in which the motion to strike is embodied was filed prior to the effective date of the revised rules.

IT IS ORDERED:

The initial decision in these proceedings is affirmed and adopted as our own and these proceedings are discontinued.

Decided October 3, 1977.

By the Commission, Division 2, Commissioners Murphy, MacFarland and Clapp.

H. G. Homme, Jr.
Acting Secretary

(Seal)

TRANSCRIPT OF HEARING ON MOTIONS

St. Louis, Missouri
February 6, 1978

Transcript of proceedings had during the hearing of the above-styled matter before the Honorable H. Kenneth Wangelin, Judge of the District Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Court No. 2 thereof.

APPEARANCES:

Mr. Robert K. Dreiling and
Mr. Theodore R. Schneider
114 West 11th Street
Kansas City, Missouri 64105 — for the plaintiff;

Pope, Ballard & Loos
700 Brawner Building
888 17th Street, N.W.
Washington, D. C.
by Mr. Dickson R. Loos — for the defendant;

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1075

The Kansas City Southern Railway Company,
Appellant,

v.

Great Lakes Carbon Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: May 18, 1979
Filed: September 24, 1979

Before GIBSON, Chief Judge, HEANEY and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Appellant Kansas City Southern Railway Co. (KCS) appeals from a district court order[1] denying its Rule 60(b)(4) motion for relief from a judgment entered in favor of appellee Great Lakes Carbon Corp. (GLC) on April 25, 1978.[2] For reversal KCS argues that the judgment was void because the district court lacked subject matter jurisdiction. KCS argues that the United States

1. *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, No. 75-808C(3) (E.D. Mo. Dec. 21, 1978) (denial of Rule 60(b)(4) motion).

2. *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 462 F. Supp. 21 (E.D. Mo. 1978).

was never made a party defendant as required by 28 U.S.C. § 2322 and that such a failure was a fatal jurisdictional defect. GLC argues that the district court did have subject matter jurisdiction, the jurisdictional issue is now res judicata and law of the case, and that a Rule 60(b)(4) motion cannot be used as a substitute for direct appeal.

For the reasons discussed below, we reverse and remand with directions to the district court to set aside the judgment.

The court is familiar with the facts of the case. *See Kansas City Southern Ry. v. Great Lakes Carbon Corp.*, No. 79-1075 (8th Cir. Apr. 2, 1979) (denial of motion to dismiss appeal). KCS filed a complaint in district court against GLC to collect $59,891.97 (as amended) in additional freight charges alleged to be due for shipments of petroleum coke[3] from a GLC plant in Port Arthur, Texas, to an export facility in Steeltown, Texas. KCS argued that the applicable rate on these shipments was described in Item 4117-B, Supplement 83, TLFB Tariff 75-Series. GLC denied liability and argued that the applicable rate was the lower rate set forth in Item 30060-A of Section 4, TLFB Tariff 75-Series. GLC also filed a counterclaim against KCS to recover $129,026.47 in alleged overcharges for shipments of petroleum coke from another GLC plant located in Chaison, Texas, to Steeltown. GLC argued that KCS had erroneously applied the higher rate described in Item 4112 of Section 2, TLFB Tariff 75-Series, when the applicable rate was the lower rate set forth in Items 30000 and 30020 of Section 4, TLFB Tariff 75-Series (from Chaison to Beaumont, Texas) and Item 216, Supplement 15, TLFB Tariff 75-Series and Reissues (from Chaison to Steeltown).

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3. Petroleum coke is a solidified residue resulting from the destructive distillation of crude petroleum or residual petroleum liquids.

In June 1976, at the request of both parties, the district court wisely entered an order staying the proceedings in district court and referring the disputed questions of tariff interpretation and application to the Interstate Commerce Commission (ICC).[4] Both parties then filed petitions for declaratory order with the ICC which were consolidated for handling. On March 31, 1977, the administrative law judge[5] filed his decision and recommended order finding that the higher specific commodity rates for petroleum coke were applicable (the position argued by KCS), but that "those rates applicable to movements from Port Arthur to Steeltown, to the extent they exceeded the rates on petroleum coke from Chaison to Steeltown, were unjust and unreasonable." This decision was essentially adverse to the position of GLC: KCS would recover a reduced amount on its complaint for undercharges ($29,898.32) but GLC would recover nothing on its counterclaim for overcharges. Following consideration of exceptions to the decision of the administrative law judge filed by GLC, the decision was affirmed and adopted by the ICC on October 7, 1977. There were no further administrative proceedings before the ICC.

Thereafter, on December 6, 1977, GLC filed a motion for summary judgment in the district court in favor of KCS on its complaint in a reduced amount and in favor of GLC on its counterclaim. GLC argued that the interpretation of the terms "freight all kinds" and "all commodities" as used in the tariff was not a matter within the

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4. *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, No. 75-808C(3) (E.D. Mo. June 3, 1976) (order of referral and stay of proceedings).

5. Hon. Richard McG. Wilkins, Administrative Law Judge, Washington, D.C. (Interstate Commerce Commission).

primary jurisdiction[6] of the ICC, that the interpretation of the ICC was erroneous, and that the district court should disregard the decision of the ICC to that extent. On January 26, 1978, KCS filed a motion for summary judgment in its favor, consistent with the decision of the ICC, for reduced recovery for undercharges and on the counterclaim. After oral argument the district court granted KCS' motion for summary judgment on its complaint in the amount of $29,898.32 plus interest and GLC's motion for summary judgment on its counterclaim in the amount of $129,026.47 plus interest. *Kansas City Southern Ry. v. Great Lakes Carbon Corp., supra*, 462 F. Supp. at 24. Neither party appealed.

KCS later filed several post-judgment motions in district court, including a motion for extension of time within which to file a notice of appeal. The motions were denied. KCS next petitioned this court for a writ of mandamus, arguing for the first time that the district court lacked subject matter jurisdiction to grant summary judgment in favor of GLC on its counterclaim. We denied the petition, characterizing it as a belated attempt to amend the final

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6. The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western P.R.R., 352 U.S. 59, 63-64 (1956); *see generally* Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964) (criticizes court deference to agency expertise).

judgment in order to file an untimely appeal.[7] KCS then filed the present Rule 60(b)(4) motion for relief from a void judgment. The motion was denied by the district court and this appeal followed.

Ordinarily, the denial of a Rule 60(b) motion is reviewed only for abuse of discretion. *E.g., V.T.A., Inc. v. AIRCO, Inc.*, 597 F.2d 220, 223-24 n.7 (10th Cir. 1979). Further, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978) (citations omitted). We note, however, that our review of a Rule 60(b)(4) motion is not quite as restricted because a motion under Rule 60(b)(4)[8] "differs markedly from motions under the clauses of Rule 60(b)." 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862, p. 197 (1973) (hereinafter cited as WRIGHT & MILLER); *see also* 7 J. MOORE, FEDERAL PRACTICE ¶ 60.25[1-3] (1979). This is because "[a] void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside." *Jordon v. Gilligan*, 500 F.2d 701, 704 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). "[T]he only question for the court is whether the judgment is void; if it is, relief from it should be granted." *Austin v. Smith*, 114 U.S. App. D.C. 97, 103, 312 F.2d 337, 343 (1962); *accord, Hicklin v. Edwards*, 226 F.2d 410, 414 (8th Cir. 1955); *see also* 11 WRIGHT & MILLER, *supra*,

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7. *Kansas City S. Ry. v. Wangelin*, No. 78-1603 (8th Cir. Sept. 8, 1978) (slip op. at 2), *reported at* 582 F.2d 1228 (decision without published opinion).

8. Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . ." In practice Rule 60(b)(4) motions are not subject to any time limitation; any judgment that is void is void from the outset. *V.T.A., Inc. v. AIRCO, Inc., supra*, 597 F.2d at 224 & n.9.

§ 2862, p. 197 (relief is mandatory). In reviewing the denial of a Rule 60(b)(4) motion, we thus necessarily examine the validity of the underlying judgment. *E.g., V.T.A., Inc. v. AIRCO, Inc., supra,* 597 F.2d at 224 n.8.

This case raises several interesting procedural questions. Our analysis is somewhat complicated by the fact that neither party was able to discern the appropriate procedure to follow. Both parties revised their procedural characterization of the proceedings in the district court and before the ICC. First, we must determine whether the district court had subject matter jurisdiction.[9]

The action was properly filed in the district court. KCS sought to recover unpaid freight charges on interstate shipments; such an action arises under an act of Congress regulating commerce and is within the original jurisdiction of the district court. 28 U.S.C. § 1337(a); *e.g., Penn Central Co. v. General Mills, Inc.,* 439 F.2d 1338, 1339 (8th Cir. 1971). As noted above, the district court determined that the questions raised in the action were within the primary jurisdiction of the ICC, stayed its proceedings and referred the matter to the ICC. A referral to the ICC merely suspends proceedings in the district court; the district court retains exclusive jurisdiction of the matter, pending resolution by the ICC. 28 U.S.C. §§ 1336(b),[10]

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9. The procedural history of the present case also raises a further question about the nature of the relationship between Rule 60(b)(4) and various finality of judgments doctrines, such as res judicata and law of the case. *See generally* Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment,* 51 MINN. L. REV. 491 (1967); Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments,* 87 YALE L.J. 164 (1977).

10. 28 U.S.C. § 1336(b) provides:

> When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

1398(b);[11] *see Southern Pacific Transportation Co. v. United States*, 505 F.2d 1252, 1254-55 (Ct. Cl. 1974); *Keller Industries, Inc. v. United States*, 449 F.2d 163, 166-67 (5th Cir. 1971); *McLean Trucking Co. v. United States*, 181 Ct. Cl. 170, 387 F.2d 657, 659-61 (1967); *International Transport, Inc. v. United States*, 337 F. Supp. 985, 988-89 (W.D. Mo.), *aff'd on appeal sub nom. C & H Transportation Co. v. ICC*, 409 U.S. 904 (1972); *Leonard Bros. Trucking Co. v. United States*, 301 F. Supp. 893, 896-97 (S.D. Fla. 1969); *Elgin, Joliet & Eastern Ry. v. Benjamin Harris & Co.*, 245 F. Supp. 467, 470-71 (N.D. Ill. 1965).

These sections authorizing the referring court to have exclusive jurisdiction to review ICC orders from referrals were the result of the 1964 amendment to 28 U.S.C. §§ 1336, 1398. Act of Aug. 30, 1964, Pub. L. No. 88-513, § 1, 78 Stat. 695 (codified at 28 U.S.C. §§ 1336(b), (c), 1398(b)).

> Prior to [the 1964 amendment] whenever the Court of Claims or District Court referred the issue to the Interstate Commerce Commission for a resolution, the Commission order emanating therefrom was subject to judicial review by a three-judge district court [this has been changed to circuit court of appeals review, see discussion *infra*], pursuant to 28 U.S.C. §§ 1336, 1398, 2284, 2321-25, rather than by the referring court. Consequently, the referring court had to await the decision of the three-judge court, the Supreme Court, if an appeal was taken, and any other proceedings which might result from such judicial decisions, before it could proceed to final judgment.

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11. 28 U.S.C. § 1398(b) provides:

A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue.

International Transport, Inc. v. United States, supra, 337 F. Supp. at 989 (citation omitted); *see also* S. Rep. No. 1394, 88th Cong., 2d Sess. 2, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 3235. We note that in 1975 Congress further amended the statutory procedure for the review of ICC orders by eliminating three-judge district courts as administrative review panels and transferring judicial review to the courts of appeals. Act of Jan. 2, 1975, Pub. L. No. 93-584, §§ 4-5, 88 Stat. 1917 (codified at 28 U.S.C. §§ 2321, 2342); *see Island Creek Coal Sales Co. v. ICC,* 561 F.2d 1219, 1222 (6th Cir. 1977); *Aluminum Co. of America v. United States,* 553 F.2d 1268, 1269-70 (D.C. Cir. 1977) (per curiam); *Chemical Leaman Tank Lines, Inc. v. United States,* 446 F. Supp. 721, 723-24 (D. Del. 1978) (per curiam); *see also* H.R. Rep. No. 93-1569, 93d Cong., 1st Sess. 1, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7025, 7025 (characterizing the then current procedure for judicial review of ICC orders as "cumbersome and outdated judicial machinery"); Anderson, *Judicial Review of Decisions of the Interstate Commerce Commission,* 31 GEO. WASH. L. REV. 277 (1962). However, nothing in the new statute or in the legislative history indicated "an intention to vest in the courts of appeals any jurisdiction with respect to ICC orders other than the jurisdiction previously exercised by three-judge district courts." *Island Creek Coal Sales Co. v. ICC, supra,* 561 F.2d at 1222. Thus, actions regarding the payment of money pursuant to 28 U.S.C. § 1336(a),[12] and actions involving referrals to the

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12. U.S.C. § 1336(a) provides:

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interrstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.

ICC, pursuant to 28 U.S.C. § 1336(b), like the present case, are matters within the jurisdiction of single-judge district courts.[13]

However, "[s]ince the 1964 amendments made no changes in the substantive law, except to fix venue and jurisdiction in the referring court, the prerequisites for judicial review remain the same." *McLean Trucking Co. v. United States, supra,* 387 F.2d at 660. One prerequisite is the exhaustion of administrative procedures before the ICC: a final order. *Id.* Another prerequisite is that a motion for review of the final order of the ICC in a referral be filed within 90 days. 28 U.S.C. § 1336(c). Further, although § 1336(b) does not require "the institution of a formal new 'civil action' by the party seeking review, [that party must] file 'a pleading setting forth the action he requests of [the district] court and stating specifically the grounds therefor.'" *Southern Pacific Transportation Co. v. United States, supra,* 505 F.2d at 1254, *citing McLean Trucking Co. v. United States, supra,* 387 F.2d at 660. GLC complied with these requirements by filing a motion for summary judgment (with memorandum in support) on December 6, 1977, within 90 days of the final order of the ICC issued October 7, 1977. Unfortunately, neither

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13. Unlike other ICC orders, payment orders are not "quasi legislative orders, in which the public at large are interested . . . ." Rather, they "affect only the rights of private individuals, have no binding force and do not subject anyone to punishment for disobedience." Such orders "are not of sufficient public importance to justify the accelerated judicial review procedure."

Aluminum Co. of America v. United States, supra, 553 F.2d at 1270 (citations omitted).

Direct judicial review in referral cases was vested exclusively in the referring district court to provide a more streamlined procedure. *McLean Trucking Co. v. United States, supra,* 387 F.2d at 659.

party made the United States or the ICC[14] a party defendant. The absence of the United States as a party in an action for judicial review of an ICC order is a fatal jurisdictional defect. 28 U.S.C. § 2322; *e.g., Schwartz v. Bowman,* 244 F. Supp. 51, 68 (S.D.N.Y. 1965), *aff'd sub nom. Annenberg v. Alleghany Corp.,* 360 F.2d 211 (2d Cir.) (per curiam), *cert. denied sub nom. Schwartz v. Eaton,* 385 U.S. 921 (1966). There is no reason why this requirement should not apply to the present case.

Congress established an exclusive method for judicial review and enforcement of ICC orders in the Urgent Deficiencies Act of 1913, 28 U.S.C. §§ 1336, 2321-23 (as amended). *E.g., B.F. Goodrich Co. v. Northwest Industries, Inc.,* 424 F.2d 1349, 1353 (3d Cir.), *cert. denied,* 400 U.S. 822 (1970); *Schwartz v. Bowman, supra,* 244 F. Supp. at 66-69. The statutory pattern was changed by the 1964 and 1975 amendments as discussed earlier. ICC orders, except those for the payment of money or which are the result of a referral from a district court, are now reviewed by the circuit courts of appeals under the provisions of the Judicial Review Act of 1950 (Hobbs Act), 28 U.S.C. §§ 2341 *et seq.,* with discretionary review by writ of certiorari in the Supreme Court, 28 U.S.C. § 1254. Venue provisions were also changed and a 60-day period for filing petitions for review in the courts of appeals was added. *See generally* H.R. Rep. No. 93-1569, 93d Cong., 1st Sess. 1, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7025,

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14. In *McLean Trucking,* which was "the first case brought under the new statutory pattern [referring to the 1964 amendments]," the Court of Claims characterized the ICC as "a necessary party whenever its decision on a referred case is attacked." 387 F.2d at 660. This characterization recognized that the general practice before the 1964 amendments was that such actions were ordinarily filed against the United States *and* the ICC. *Id.* In our opinion the ICC should be made a party in cases like the present one. However, the more serious, and dispositive, omission was the failure to join the United States as a party defendant. *See* discussion in text *infra.*

7034-36 (report of Department of Justice). As noted earlier, the 1964 amendments provided that appeals from ICC orders in judicial reference cases were heard by the referring court. These amendments did not, however, change the requirement that the United States be made a party defendant.

We note that 28 U.S.C. § 2321(b) expressly provides: "The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter." Section 2322 further provides: "All actions specified in section 2321 of this title shall be brought by or against the United States." Case law establishes that the requirements of the Urgent Deficiencies Act are not mere matters of procedure, *North Dakota ex rel. Lemke v. Chicago & Northwestern Ry.*, 257 U.S. 485, 490 (1922), and that compliance is strictly enforced for public policy reasons. *E.g., Ayrshire Collieries Corp. v. United States,* 331 U.S. 132 (1947). Although it is true that the earlier case law focused upon the difficulties inherent in three-judge district court review, *id.* at 144 (participation of less than three judges held to render decision void), the policy reasons for making the United States a party remain valid: to insure that the public interest, as well as the interests of all interested parties, *see* 28 U.S.C. § 2323, in this important and specialized area would be protected. That this requirement continues to be applicable was explicitly recognized in the legislative history to the 1975 amendments:

> *In all other material respects, the existing procedure will continue under the new statute. Thus, actions will be filed against the United States,* with the Attorney General managing and controlling the de-

> fense of the agency's order. This is in line with existing procedure applicable to the ICC and to agencies already governed by the Judicial Review Act . . . .

H.R. Rep. No. 93-1569, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7025, 7036 (emphasis added). Therefore, the United States is an indispensable party to an action for review of an ICC order in a referral case. *Elgin, Joliet & Eastern Ry. v. Benjamin Harris & Co., supra,* 245 F. Supp. at 470; *cf. Southern Pacific Transportation Co. v. United States, supra,* 505 F.2d at 1254 (Court of Claims case in which the United States was already a party); *Keller Industries, Inc. v. United States, supra,* 449 F.2d at 165 (referral case in which the United States was made a party; discussion of whether three-judge or single judge district court was required); *Schwartz v. Bowman, supra,* 244 F. Supp. at 68-69 (discussion of requirements of Urgent Deficiencies Act). We reverse the denial of the Rule 60(b)(4) motion and remand to the district court with directions to set aside the judgment entered on April 25, 1978, as void for lack of subject matter jurisdiction. The parties may seek judicial review of the ICC order by amending the pleadings in the action now pending in the district court to include the United States as a party defendant. In addition, we suggest that the better practice would be to make the ICC a party to the review proceedings as well. *See* note 14, *supra.*

Further, we note that to the extent relief under the Rule 60(b)(4) motion has enabled KCS to evade the doctrine of the finality of judgments[15] and to in effect "appeal"

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15. *See Durfee v. Duke,* 375 U.S. 106, 113 (1963), *citing Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 78 (1939); *Chicot County Drainage Dist v. Baxter State Bank,* 308 U.S. 371 (1940); *Stoll v. Gottlieb,* 305 U.S. 165 (1938).

Moreover, res judicata is not applicable in the present case. As observed by Professor Dobbs,

(Continued on following page)

indirectly from a final judgment, it would seem that this is the intended function of Rule 60(b)(4). "This subdivision [of Rule 60(b)] provides relief from final judgment if the judgment is void." *V.T.A., Inc. v. AIRCO, Inc., supra,* 597 F.2d at 224. It is apparent from the record in the present case that the district court lacked subject matter jurisdiction: the United States is not a party to the proceeding. It makes little difference that this jurisdictional question was raised for the first time under Rule 60(b)(4):

> Questions of jurisdiction, of course, can be raised at any time. And, as the Supreme Court said in Lambert Run in a private action in which indirect attack was made on ICC orders.—"Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist."

Schwartz v. Bowman, supra, 244 F. Supp. at 69 (direct review), *citing Lambert Run Coal Co. v. Baltimore & Ohio R.R.,* 258 U.S. 377, 382 (1922) (necessity of strict compliance with procedural requirements of Urgent Deficiencies Act).

GLC also argues that the order of the ICC was merely an advisory opinion. GLC argues that the action was not referred to the ICC and that KCS did not consider that "Stay one of referral to the Interstate Commerce Commis-

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Footnote continued—

> res judicata comes into play only when there is a final judgment and a collateral attack—that is, when there is a second and distinct suit. Since a motion under Rule 60(b) is a motion in the original suit and is thus a direct attack, there is no res judicata involved and the issue of jurisdiction cannot be foreclosed by that doctrine.

Dobbs, *Beyond Bootstrap, supra* note 9, 51 MINN. L. REV. at 496. Dobbs argues that the "bootstrap principle" should foreclose examination of jurisdictional issues, even under Rule 60(b)(4), after appeal. *Id. See generally* Dobbs, *The Validation of Void Judgments: The Bootstrap Principle, Part II - The Scope of Bootstrap,* 53 VA. L. REV. 1241 (1967).

sion." Brief of Appellee, at 16, *citing* Brief of Appellant, at 12. GLC characterizes the district court order of June 3, 1976, as "a direction to the parties to file Petitions with the Commission to ascertain its view as to such of the subject matter as would be within its primary jurisdiction." Brief of Appellee, at 16. That neither party fully understood the nature of the procedure is beside the point. The district court considered its order (see Appendix A) to be a referral, *Kansas City Southern Ry. v. Great Lakes Carbon Corp., supra,* 462 F. Supp. at 22, and we agree with that view. A referral to the ICC is the only characterization consistent with the statutory pattern discussed above. *See* 28 U.S.C. §§ 1336(a)(b), 1398(b), 2321(b). The fact that the matter came before the ICC pursuant to a referral from the district court under 28 U.S.C. § 1336(b) did not transform the resulting order into an advisory opinion. The ICC order in the present case was not a mere abstract declaration but determined the rights of the parties to recover, the applicability of the tariffs and the reasonableness of the rates at issue. *Pennsylvania R.R. v. United States,* 363 U.S. 202, 205 (1960), *citing Rochester Telephone Corp. v. United States,* 307 U.S. 125, 131-32, 143 (1939), *and El Dorado Oil Works v. United States,* 328 U.S. 12, 18 (1946).

Finally, we address briefly the question of primary jurisdiction. In our opinion the question of the applicability of tariffs to particular commodities is within the primary jurisdiction of the ICC. *See Elgin, Joliet & Eastern Ry. v. Benjamin Harris & Co., supra,* 245 F. Supp. at 471. We find the thorough opinion of Judge Ross in *Penn Central Co. v. General Mills, Inc., supra,* 439 F.2d at 1340-42, and the cases cited therein to be distinguishable. The question at issue in the present case involves the interpretation of a tariff and terms used in a technical way. We note that the decision of the administrative law judge in part rested

upon the interpretation of the terms "freight all kinds" and "all commodities" but also in part upon the non-alternating nature of the specific commodity rates. *See* Appendix B. The ICC is obviously more familiar with the interaction and construction of tariffs than the court. In short, we think the question presented falls within the principles established in *United States v. Western Pacific R.R.*: the construction and applicability of the tariff at issue raised "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the Act." 352 U.S. at 65. We note further that once the primary jurisdiction of the ICC has been invoked on a particular question, the scope of judicial review is limited: "Unless the findings of the Commission are contrary to law, arbitrary, capricious or unsupported by substantial evidence, they may not be set aside. . . . [T]he judicial function is exhausted when there is found to be a rational basis for the Commission's conclusions." *McLean Trucking Co. v. United States, supra,* 387 F.2d at 661, *citing General Motors Corp. v. United States,* 324 F.2d 604, 605 (6th Cir. 1963), *and Mississippi Valley Barge Line Co. v. United States,* 292 U.S. 282, 286-87 (1934).

Accordingly, the order of the district court denying appellant's Rule 60(b)(4) motion is reversed and remanded with directions.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX A

ORDER OF REFERRAL AND STAY OF PROCEEDINGS

(Filed June 3, 1976)

Now on this 3 day of June, 1976, Joint Motion of plaintiff and defendant to refer to the controversy to the Interstate Commerce Commission for a determination of the applicability and justness and reasonableness of certain rates and regulation and to hold matter in abeyance pending the determination by the Interstate Commerce Commission having come on for hearing before this Court, the Court finds as follows:

1. That this lawsuit involves an action for alleged undercharges by the plaintiff and a counterclaim for alleged overcharges by the defendant.

2. That determination of these controversies involve the interpretation and application and the justness and reasonableness of certain tariffs filed with the Interstate Commerce Commission. Primary jurisdiction for the determination of the interpretation and application and justness and reasonableness of such tariffs of interstate rail carriers is vested by federal law in the Interstate Commerce Commission.

3. The Interstate Commerce Commission is a specialized, primary and appropriate forum for the adjudication of these controversies and its determination will likely be decisive of all claims herein and will be binding and legally effective upon all parties hereto.

4. That all parties to this proceeding have agreed that the matter should be referred to the Interstate Commerce Commission for interpretation.

NOW, THEREFORE, inasmuch as this lawsuit involves a matter of the interpretation of particular tariff items, and the justness and reasonableness of such tariff items, that questions of tariff interpretation and justness and reasonableness of tariffs are within the primary jurisdiction of the Interstate Commerce Commission; and that all parties are agreed that this matter should be referred to the Interstate Commerce Commission for disposition.

IT IS HEREBY ORDERED AND DECREED that this matter be, and the same is hereby, referred to the Interstate Commerce Commission for resolution and that pending such resolution the instant proceeding will be held in abeyance. The parties are directed within 60 days of the date of this order to file petitions with the Interstate Commerce Commission for declaratory orders to bring these matters before that agency for prompt determination. Parties are further directed to give notice to this Court of the filing of the petition with the Interstate Commerce Commission.

/s/ H. Kenneth Wangelin
Judge

Dated this 3 day of June, 1976.

APPENDIX B

INTERSTATE COMMERCE COMMISSION
INITIAL DECISION

No. 36406*

PETITION FOR DECLARATORY ORDER— GREAT LAKES CARBON CORPORATION— PETROLEUM COKE

(Service Date March 31, 1977)

1. Assailed rates and charges on shipments of petroleum coke in Texas from Chaison to Steeltown for export found to have been applicable, just and reasonable.

2. Sought rates and charges on export shipments of petroleum coke in Texas from Port Arthur to Steeltown found to have been applicable but not just and reasonable, to the extent they exceeded those in No. 1, above.

3. Proceedings discontinued.

Dickson R. Loos and *Barry Roberts* for the shipper, Great Lakes Carbon Corporation.

Robert K. Dreiling and *Robert E. Zimmerman* for the rail carrier, The Kansas City Southern Railway Company.

By Richard McG. Wilkins, Administrative Law Judge:

By a petition filed in the lead proceeding on August 2, 1976, the shipper, Great Lakes Carbon Corporation, requests a declaratory order from this Commission concerning the rates and charges on movements of petroleum coke in Texas, from Chaison to Steeltown, for export. By a

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*Embraces Docket No. 36406 (Sub-No. 1), The Kansas City Southern Railway Company—Petition for Declaratory Order—Petroleum Coke.

petition filed on the same date in the embraced proceeding, the rail carrier, The Kansas City Southern Railway Company, requests a declaratory order concerning the rates and charges on export movements in Texas from Port Arthur to Steeltown of the same commodity. Both proceedings result from an order dated June 3, 1976, by the United States District Court for the Eastern District of Missouri in Civil Action No. 75-808C(3) referring the matters therein to this agency for determination of the applicable rates and the justness and reasonableness thereof.

By orders dated August 11 and August 26, 1976, in the lead and embraced proceedings, respectively, the matters were placed under modified procedure. By order dated September 17, 1976, the two proceedings were consolidated. Statements and replies were duly filed by the parties; requested findings not adopted herein or reflected in the conclusions have been considered and found not justified. Short titles may be used in this report.

In the lead proceeding, at issue are alleged overcharges in violation of section 6 of the Interstate Commerce Act on 4,762 carloads moving from Chaison to Steeltown between June 2, 1972, and February 26, 1973. Violation of sections 1 and 4 of the Act, and of Tariff Circular No. 20, are also alleged. In the embraced proceeding, at issue are alleged undercharges on movement of 621 carloads in carrier-owned equipment from Port Arthur to Steeltown between May 6 and August 16 of 1974. In both of the proceedings, the shipper alleges that lower freight-all-kinds-rates applied and the carrier contends that higher specific commodity rates on petroleum coke applied. The shipper also contends that the latter, if applicable, were unjust and unreasonable.

The pertinent rail tariff provides, in section 2, nonalternating commodity rates on petroleum coke from the

points here involved either directly, such as Chaison, or through a rule applying the rate from the next point beyond in the case of Port Arthur. In item 216 of the tariff, single-line rates named to Port Arthur or Beaumont, Tex., for export also apply to Steeltown. The tariff also contains, in section 4, rates on freight all kinds, applicable to all commodities moving in mixtures of at least two commodities, from and to the points here involved, directly or by application of an intermediate point rule.

Petroleum coke is a solidified residue resulting from the destructive distillation of crude petroleum or residual petroleum liquids. In the lead proceeding, the coke moved from a refinery at Chaison. During the period involved, there was no rate published specifically for such movements, but, as noted above, the tariff provided for application to Steeltown of rates to Beaumont or to Port Arthur. The higher, non-alternating rate on petroleum coke from Chaison to Port Arthur was assessed; the shipper maintains that it was entitled to the lower freight-all-kinds rate named to Beaumont, under tariff item 70 making applicable that rate which results in the lower charge. Cases are cited by the shipper to the effect that any ambiguity should be resolved against the carrier.

In the lead proceeding, the carrier points out that item 70 of the tariffs provides for application of the lower rate in the same rate item, not in different sections of the tariff. Also, it is noted that both sections 2 and 4 of the tariff state that when there are rates published in section 2 only those rates will apply to given traffic, whether the points are specifically named or otherwise included. Further as noted above, the rates in section 4 of the tariff apply only to mixtures of two or more commodities.

In the embraced proceeding, the carrier assessed charges on multiple-car movements from Port Arthur to

Steeltown, on the basis of rates for movements of petroleum coke from West Port Arthur to Steeltown in section 2 of the tariff, Port Arthur being an intermediate origin. The shipper paid on the rate basis for freight all kinds found in section 4 of the tariff, a basis which the carrier maintains does not apply by the non-alternating terms of both tariff sections. Court action by the carrier is to recover the difference between the amount assessed and the amount paid, namely $59,891.87. Several cases are cited by the carrier to the proposition that unnamed intermediate points are specific points for the application of rates under an intermediate point rule, including *Addition of Milwaukee to Chicago Group Rates—K.C.*, 318 I.C.C. 755, 758.

The shipper's position in the embraced proceeding is that while the rates in section 2 of the tariff were admittedly applicable to movements in private equipment, rates in section 4 of the tariffs were applicable to movements from Port Arthur to Steeltown in carrier-owned equipment. Only the movements in carrier equipment are at issue herein.

According to the shipper, the applicable charges are composed of a switching charge plus a rate in section 4 of the tariff on freight all kinds for movements from West Port Arthur to Atreco, Tex., the next point beyond Steeltown on a route allegedly available at the time the shipments moved. It is argued that the higher charge from a rate in section 2 of the tariff on shipments from West Port Arthur to Steeltown, over the route of movement, violates section 4 of the Act as a through rate higher than the aggregate of intermediate rates over a route then available. Numerous cases are cited to the effect that no tariff restriction of a rate can change its availability as an intermediate factor under section 4 of the Act, and that violation thereof requires reparations. The shipper also maintains that the rates relied upon by the carrier were

unjust and unreasonable to the extent they exceeded those in section 4 of the tariff, allegedly so excessive as to constitute a prima facie showing of unreasonableness when compared with other carload rates for substantially similar movements in the same territory.

In the embraced proceeding, the carrier replies that the non-alternating provisions of both sections 2 and 4 of the tariffs preclude use of rates in the latter, which applied to all classes of commodities. Numerous cases are cited to the effect that mere violation of Tariff Circular No. 20 rules does not invalidate the tariffs or warrant reparations. The carrier points out that an intermediate point rule only applies where the point is intermediate over a feasible route; the route referred to by the shipper was beset by operational and environmental difficulties and has since been closed. Several cases are cited. The switching charge of the Southern Pacific Transportation Co. allegedly cannot be used as an intermediate factor, in which event it would have to be paid by the shipper, since it would not be applicable in the absence of a through rate; cited is *Brown-Strauss Corp. v. Alton R.R.*, 219 I.C.C. 69, 77.

It is the position of the carrier that the shipper's attempt to show the section 2 rates to be unjust and unreasonable through rate comparisons fails because only distances are compared. The carrier argues that a similarity of transportation conditions must be shown; several cases, including *Clements Foods Co. of Oklahoma City v. St. Louis-S.F. Ry.*, 315 I.C.C. 516, 517-518, are cited.

The carrier's evidence allegedly shows dissimilarities, including the fact that only the rates in section 2 of the tariff incorporate the Southern Pacific switching charge. The lower rate from Chaison resulted from a regular high volume of multiple-car traffic, and no petroleum coke has moved between the origins and destinations named in section 4 of the tariff for freight all kinds.

According to the carrier, the section 2 rate from Port Arthur to Steeltown was based upon the rate from West Port Arthur to Steeltown, less the amount of the reciprocal switching charge made by the Southern Pacific and absorbed by the carrier herein; however, a review of the tariffs reveals that a rate level was established specifically from Port Arthur to Steeltown subsequent to the movements herein. If the rate from Port Arthur is just and reasonable, then allegedly the basic rate must be so considered, but that does not follow in a reduction.

The carrier also discusses the shipper's claims as to rates on shipments in privately owned cars, but the shipper agrees that they are not before us. The carrier alleges that the correct charges were assessed, but not paid, on the involved traffic in the embraced proceeding. Both parties assert that a determination of the issues herein would in no way affect the quality of the human environment.

The difficulty with the shipper's position lies in the fact that the lower freight-all-kinds rates in section 4 of the tariff applied to mixtures, not shipments of single commodities such as petroleum coke. Also, the specific commodity rates in section 2 of the tariff did not alternate with other rates. Taken together, these provisions negate the shipper's arguments as to applicability or violation of section 4 of the Act, and there was no violation of Tariff Circular 20 since only the rates in section 2 of the tariff were applicable to the traffic at issue.

The shipper maintains, in the embraced proceeding, that if the rates in section 2 of the tariff were applicable to movements from Port Arthur to Steeltown, then they were unreasonable when compared with other rates. The section 2 rates were about $40 to $50 per car higher than the rates on longer movements of petroleum coke from Chaison to Steeltown or Chaison to Port Arthur. The

shipper's comparison with rates even lower on freight all kinds is not meaningful because those rates applied only to mixtures.

According to the carrier, section 2 rates, after the issue period, from Port Arthur to Steeltown reflect its absorption of a reciprocal switching charge. The rate level from Chaison to Steeltown allegedly resulted from a demonstrated, regular, high volume of multiple-car traffic; however, while this may explain some difference in rate levels, those rates were not limited to multiple-car movements. The carrier does not attempt to distinguish the rate from Chaison to Port Arthur in this regard. Also, none of these rates were for movements exceeding 20 miles in the same vicinity; compare *Fresh Meats from Davenport, Iowa, to Melbourne, Fla.*, 315 I.C.C. 621, 622. Conditions appear similar.

In view of the above, the Judge concludes and finds that the rates in section 2 of the rail tariff were applicable to the movements involved in both proceedings, but that in the embraced proceeding those rates applicable to movements from Port Arthur to Steeltown, to the extent they exceeded the rates on petroleum coke from Chaison to Steeltown, were unjust and unreasonable. It is also found that this is not a major Federal action significantly affecting the quality of the human evnironment within the meaning of the National Environmental Policy Act of 1969.

Accordingly, it is the ORDER of the Administrative Law Judge that these proceedings be, and they are hereby, discontinued, and that in the absence of a stay or postponement by the Commission, or the timely filing of an appeal, the effective date of this order shall be 20 days from the date served.

Dated in Washington, D.C., this 22nd day of March, 1977.

By the Commission, Richard McG. Wilkins, Administrative Law Judge.

Robert L. Oswald
Secretary

(Seal)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1075

Kansas City Southern Railway Company,
Appellant,

v.

Great Lakes Carbon Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 16, 1980
Filed: June 16, 1980

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and McMILLIAN, Circuit Judges, En banc.

LAY, Chief Judge.

In an earlier decision this court overturned the district court's denial of Kansas City Southern Railway Company's (Railway Co.), motion to set aside a judgment under Rule 60(b)(4) of the Federal Rules of Civil Procedure. *Kansas City Southern Railway v. Great Lakes Carbon Corp.*, 595 F.2d 431 (8th Cir. 1979). A motion for rehearing was granted, and this decision follows argument to the court en banc.

The Railway Co. originally sued Great Lakes Carbon Corporation (GLC), for additional freight charges, claim-

ing it had undercharged GLC because a higher, specific commodity rate should apply to petroleum coke the GLC shipped. GLC urged a lower freight-all-kinds rate applied. It also counterclaimed for overcharges on another shipment. On the parties' joint motion, the district court referred interpretation of tariff items and their reasonableness to the Interstate Commerce Commission (ICC), and held the lawsuit in abeyance. The ICC affirmed an administrative law judge's decision that generally sustained the Railway Co.'s tariff interpretation. However, it held it would be unjust and unreasonable for the Railway Co. to collect the full tariff for the shipment upon which its complaint was based. Under the ICC decision, the Railway Co. would have recovered a reduced amount and GLC would not have recovered anything on its counterclaim. Each party then filed for summary judgment in the district court. The court entered judgment for the Railway Co. on its complaint for $29,898.32 plus interest, in accord with the ICC decision. However, the court held it was not bound by the ICC decision, and therefore granted GLC's motion for summary judgment on its counterclaim, entering judgment on its behalf for $129,026.47 plus interest.

The Railway Co. did not appeal within 30 days as required by Rule 4(a) of the Federarl Rules of Appellate Procedure. After its motion for an extension of time was denied, it attempted to resurrect a judgment for appeal by petitioning this court for a writ of mandamus that would order the district court to rule on its motion for summary judgment. We dismissed the petition, stating that the Railway Co.'s motion for summary judgment as to GLC's counterclaim had been ruled upon and we viewed the petition as an attempt to file an untimely appeal. *Kansas City Southern Railway v. Wangelin*, 582 F.2d 1288 (8th Cir. 1978) (*mem.*).

The Railway Co. then filed a motion in district court, asserting that under Rule 60(b)(4) of the Federal Rules of Civil Procedure the judgment should be set aside as void. It argued the district court lacked subject matter jurisdiction because it did not follow the procedure set forth in chapter 157 of title 28, sections 2321-23, for review of an ICC order, namely joinder of the United States as a defendant. 28 U.S.C. § 2322. The district court denied relief, stating it had considered the basic issues raised in its earlier opinion, from which no apepal had been taken. The Railway Co. appealed, and a panel of this court reversed the district court, holding *inter alia,* that the original judgment was void and could be set aside under Rule 60(b)(4). The court acting en banc now vacates that decision and enters judgment affirming the district court.

In this appeal we assume, without deciding, that under the jurisdictional facts presented the United States was required to be joined as a party defendant pursuant to 28 U.S.C. § 2322 once GLC sought review of the ICC decision by motion for summary judgment. The fundamental question presented here is whether Rule 60(b)(4)[1] may serve as the procedural vehicle to attack the judgment on the ground that it is a nullity because of the absence of the United States.

In *Schwartz v. Bowman,* 244 F. Supp. 51, 65-69 (S.D. N.Y. 1965), *aff'd sub nom Annenberg v. Alleghany Corp.,* 360 F.2d 211 (2d Cir.) (per curiam), *cert. denied,* 385 U.S. 921 (1966), the court held an ICC order could not be attacked indirectly under the Investment Company Act of

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1. Fed.R.Civ.P. 60(b)(4) reads as follows:

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; . . . .

1940, 15 U.S.C. § 80a; it held chapter 157 of title 28, the Urgent Deficiencies Act, is the exclusive method for enforcement or review of ICC orders. As the claim had not been brought under the Urgent Deficiencies Act and none of its procedural requirements had been met, including joinder of the United States, the court held it lacked jurisdiction. This holding only serves to obscure the question presented in this appeal.[2] Assuming the district court erred here in finding jurisdiction despite the absence of the United States,[3] the question upon which relief hinges

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2. The court did not hold that the United States was an indispensable party, nor that its absence alone deprived the court of jurisdiction.

Even if the United States is deemed an indispensable party, its absence may not be a jurisdictional defect. Some cases have used language indicating dismissal for nonjoinder of an indispensable party is dismissal for lack of jurisdiction. *See, e.g., Agrashell, Inc. v. Hammons Prods. Co.*, 352 F.2d 443, 447 (8th Cir. 1965). The weight of authority is against this characterization. *See, e.g., Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 196 (1827); *Clarkson Co. v. Shaheen*, 544 F.2d 624, 628 (2d Cir. 1976); *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258, 1265 n.26 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091 (1976); *Moore v. Knowles*, 482 F.2d 1069, 1075 (5th Cir. 1973); *Warner v. First Nat. Bank*, 236 F.2d 853, 857 (8th Cir.), *cert. denied*, 352 U.S. 927 (1956); *Dyer v. Stauffer*, 19 F.2d 922 (6th Cir.), *cert. denied*, 275 U.S. 551 (1927); *Agrashell Inc. v. Composition Materials Co.*, 40 F.R.D. 395, 397 (S.D.N.Y. 1966); 7 C. Wright & A. Miller, Federal Practice and Procedure § 1611 at 115-17, 121 (1972); 3A Moore's Federal Practice ¶ 19.04[2] & ¶ 19.19 at 345 (2d ed. 1979). These authorities rely upon the history of the indispensable party doctrine in equity and the emphasis on equitable considerations in Fed. R. Civ. P. 19. This reasoning may be less persuasive when the joinder of party requirement is imposed by a statutory grant of jurisdiction. *See Noland v. United States Civil Service Comm'n*, 544 F.2d 333, 334 (8th Cir. 1976).

3. In granting relief, the district court not only had to implicitly decide whether the United States was a necessary or indispensable party under 28 U.S.C. §§ 2321-23, but also whether the ICC order was in effect one for payment of money, which would be statutorily exempted from the requirement of joinder of the United States, 28 U.S.C. § 2321(b), and whether joinder was not necessary because the ICC order was advisory only.

We note that the statutory exemption from 28 U.S.C. §§ 2321-23 procedures, section 2321(b), does not encompass GLC's motion for summary judgment on its counterclaim. GLC sought to avoid the effect of the ICC order, and section 2321(b) applies only to actions brought in district court to *enforce* an ICC payment order.

is whether that error, never presented on appeal from the judgment, may nevertheless be corrected in a Rule 60(b)(4) proceeding on the ground that it renders the judgment void. We conclude that the judgment is not void within the meaning of Rule 60(b)(4), and any jurisdictional defect caused by nonjoinder may not now be challenged.[4]

Absence of subject matter jurisdiction *may*, in certain cases, render a judgment void. *See e.g., Kalb v. Feuerstein*, 308 U.S. 433 (1940). However, this occurs only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority. *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *see Coalition of Black Leadership v. Cianci*, 570 F.2d 12, 15 (1st Cir. 1978) (quoting *Lubben v. Selective Service System*, 453 F.2d 645, 649 (1st Cir. 1972)); *Ben Sager Chemicals v. E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977); 7 Moore's Federal Practice ¶ 60.25[2] at 302-3 (2d ed. 1979). Stated another way, such plain usurpation of power occurs when there is a "total want of jurisdiction" as distinguished from "an error in the exercise of jurisdiction." *Lubben v. Selective Service System*, 453 F.2d at 649. Since federal courts have "jurisdiction to determine jurisdiction," that is, "power to interpret the language of the jurisdictional instrument and its application to an issue by the court," *Stoll v. Gottlieb*, 305 U.S. at 171, error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction. Such an erroneous interpretation does not render the judgment a complete nullity. *See Chicot County Drainage District v. Baxter State Bank*,

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4. It is basic that Fed.R.Civ.P. 60(b) is not a substitute for appeal. *Horace v. St. Louis S.W. R.R.*, 489 F.2d 632, 633 (8th Cir. 1974). If a judgment is not void, but rather rests upon an erroneous jurisdictional determination, Rule 60(b)(4) is not properly invoked to extend time for appeal that has already expired. *See id.; Hoffman v. Celebrezze*, 405 F.2d 833, 837 (8th Cir. 1969).

308 U.S. 371, 376-77 (1940); 7 *Moore's, supra* ¶ 60.25[2], at 296-97. A void judgment, as opposed to an erroneous one, is one which from its inception was legally ineffective. *See Williams v. North Carolina,* 325 U.S. 226 (1945); *Jordon v. Gilligan,* 500 F.2d 701, 710 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975); *Lubben v. Selective Service System,* 453 F.2d at 649; 7 Moore's, *supra* ¶ 60.25[2].[5]

In the present case, even assuming the district court erred in construing its statutory grant of authority by not joining the United States, we hold such jurisdictional error does not render the judgment void within the meaning of Rule 60(b)(4).

We reach this conclusion because the court was vested with power to deal with this type of case and had acquired jurisdiction over the parties before it.[6] It is clear

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5. The concept of a void judgment is extremely limited. *V.T.A., Inc. v. Airco, Inc.,* 597 F.2d 220, 225 (10th Cir. 1979); *Coalition of Black Leadership v. Cianci,* 570 F.2d 12, 15 (1st Cir. 1978) (quoting *Lubben v. Selective Service System,* 453 F.2d 645, 649 (1st Cir. 1972)); *Ben Sager Chemicals v. E. Targosz & Co.,* 560 F.2d 805, 812 (7th Cir. 1977). Professor Moore indicates the concept is so narrowly restricted that, although seemingly incongruous, a federal court judgment is almost never void because of lack of federal subject matter jurisdiction. *See* 7 Moore's, *supra* ¶ 60.25[2], at 305-06.

6. *See, e.g., Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940) (federal statute that was basis for decree subsequently ruled unconstitutional, nevertheless court had jurisdiction over parties and could pass implicitly on its jurisdiction over the claim or statute's constitutionality, even if its holding were erroneous); *Stoll v. Gottlieb,* 305 U.S. 165, 171 (1938) (no jurisdiction in federal bankruptcy court over subject matter of order, court with jurisdiction of parties nevertheless could erroneously decide there was); *Marshall v. Board of Educ.,* 575 F.2d 417, 422-23 (3d Cir. 1978) (application of statute to certain defendants later held to be unconstitutional, nevertheless judgment was not void since the court had jurisdiction to erroneously pass on the issue); 7 Moore's *supra* ¶ 60.25[2], at 302 (2d ed. 1979).

Often determination of subject matter jurisdiction rests upon a finding of jurisdictional fact, rather than, as in this case, construing a statutory grant of jurisdiction. When facts must be

(Continued on following page)

that the district court had original jurisdiction to decide GLC's and the Railway Co.'s claims under 28 U.S.C. § 1337(a); it also had jurisdiction to review the ICC order entered upon referral under 28 U.S.C. § 1336(b).[7] It had jurisdiction over the general subject matter and accordingly could decide whether the United States should be joined and whether its nonjoinder was a jurisdictional defect. Even assuming the district court erred, the error has no bearing on its power to decide those issues.

The district court implicitly decided whether joinder of the United States, a prerequisite for review under 28 U.S.C. §§ 2321(a), 2342, was also required for it to review an order under 28 U.S.C. § 1336(b). With jurisdiction over the type of case and over the parties, the court could enter a judgment for money damages. In doing so, it could determine whether it had jurisdiction to entertain the parties' motions for summary judgment and for this purpose construe and apply the statutes under which it was requested to grant relief. An erroneous decision on the interpretation and applicability of sections 1336(b) and 2322 would not deprive it of power to decide. As the Supreme Court has stated:

> Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute

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Footnote continued—
proven before a court will exercise its jurisdiction, voidness often turns upon the distinction between essential jurisdictional facts such as service of process or location of the *res*, and quasi-jurisdictional facts such as diversity of citizenship or amount in controversy. *See Noble v. Union River Logging R.R.*, 147 U.S. 165, 173-74 (1893); *see, e.g., Lubben v. Selective Service System*, 453 F.2d 645, 649 (1st Cir. 1972); *Independence Mortgage Trust v. White*, 446 F. Supp. 120 (D. Ore. 1978). Federal subject matter jurisdiction turns upon findings of quasi-jurisdictional facts. 7 Moore's, *supra* ¶ 60.25[2], at 307 n.59.

7. This latter jurisdictional basis assumes, although we do not decide the issue here, that the district court was reviewing an ICC order, rather than acting in the realm of its own original jurisdiction with the benefit of an ICC advisory opinion.

> have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination.

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 377 (1940).

Under the circumstances, the judgment may not be vacated under Rule 60(b)(4). *Marshall v. Board of Education*, 575 F.2d 417, 422 (2d Cir. 1978); *Coalition of Black Leadership v. Cianci*, 570 F.2d at 15-16 (by implication); *Ben Sager Chemicals v. E. Targosz & Co.*, 560 F.2d at 812; *cf. Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941) (motion to set aside, prior to promulgation of Rule 60(b)(4)).

Competing policies are at stake in setting aside a federal court judgment as void for lack of subject matter jurisdiction: observation of limits on federal jurisdiction and need for judgments that are final. However, when the challenge is to an erroneous interpretation of a statutory grant of jurisdiction and the judgment is not appealed, thus becoming final, the policy favoring certainty in judicial resolution of controversies prevails.

The panel opinion is ordered vacated and the district court judgment affirmed.

ROSS, Circuit Judge, Concurring.

I concur in the majority opinion not only for the reasons stated therein, but also for an additional reason. In my opinion the United States was not an indispensable party to the counterclaim portion of the case under 28 U.S.C. §§ 2321-23, and therefore there was no jurisdictional defect as indicated by the panel decision.

The counterclaim was not, as required by section 2321, "a proceedings to enjoin or suspend * * * a rule, regula-

tion or order of the Interstate Commerce Commission" or "an action to enforce * * * any order of the Interstate Commerce Commission." Rather it was an action "for the payment of money" which is specifically exempted from the provisions of section 2321. If section 2321 is not involved, then by its terms section 2322 is not involved either and it was not necessary to join the United States as a party. I believe that 28 U.S.C. §§ 2321-23 was meant to apply to appeals to our court from an order of the ICC, not to appeals to our court from a district court case involving an action "for the payment of money."

McMILLIAN, Circuit Judge, Dissenting.

After carefully considering the majority opinion and the concurring opinion, I continue to adhere to the general analysis set forth in the panel decision and therefore dissent.

To the extent relief under Rule 60(b)(4) enables a party to evade the doctrine of finality of judgments and to in effect appeal indirectly from a final judgment, I think this is the function of Rule 60(b)(4). In my view, the judgment of the district court is void for lack of subject matter jurisdiction because, as is apparent from the face of the record, the United States was not a party to the proceedings below. In the present case, the failure to join the United States is a "fatal" jurisdictional defect. *See Schwartz v. Bowman*, 244 F. Supp. 51, 69 (S.D.N.Y. 1965), *aff'd sub nom. Annenberg v. Alleghany Corp.*, 360 F.2d 211 (2d Cir.) (per curiam), *cert. denied*, 385 U.S. 921 (1966), *citing Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922). The United States should have been made a party because the action was a direct review proceeding to set aside or suspend an

order of the Interstate Commerce Commission (ICC) under § 17(10)[1] of the Interstate Commerce Act, 49 U.S.C.

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1. 49 U.S.C. § 17(10) provides:

> Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing etc.
>
> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commission, or a board with respect to any matter or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such a decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

This section was formerly numbered § 17(9) and was added to the Interstate Commerce Act in 1940 by the Transportation Act of 1940, ch. 722, § 12, 54 Stat. 916. The Supreme Court characterized this section as "basically a provision requiring exhaustion of administrative remedies prior to resort to the courts." *ICC c. Atlantic Coast Line R.R., infra,* 383 U.S. at 583 n.2. In 1976 this section was renumbered and a new § 17(9) was added providing new administrative hearing and review procedures. Act of Feb. 5, 1976, Pub. L. No. 94-210, § 303(a), 90 Stat. 48. In the Revised Interstate Commerce Act (*see* note 2 *infra*) § 17(10) is now § 10325, which provides:

> Judicial review—nonrail proceedings
>
> A civil action to enforce, enjoin, suspend, or set aside an action of the Interstate Commerce Commission taken by a division, individual Commissioner, employee board, or employee delegated to act under section 10305 of this title may be started in a court of the United States only—
>
> (1) on denial of an application for rehearing, reargument, or reconsideration; or
>
> (2) if the application is granted, after a rehearing, reargument, reconsideration or other disposition by the Commission or an appellate division under section 10323 of this title.

49 U.S.C. § 10325. New § 17(9) (added in 1976) is now 49 U.S.C. § 10327.

For clarity, I shall refer to a former § 17(9) action (new § 17(10) and now codified at 49 U.S.C. § 10325) as a direct review proceeding and a § 16(2) action (now codified at 49 U.S.C. § 11705) as an enforcement action.

§ 17(10), as revised and codified[2] at 49 U.S.C. § 10325, and not an action to enforce a reparation award under § 16(2)[3] of the Act, 49 U.S.C. § 16(2), as revised and codified at 49 U.S.C. § 11705. *See ICC v. Atlantic Coast Line R.R.*, 383 U.S. 576, 579-89, 602-09 (1966) (hereinafter *Atlantic*).

As a preliminary matter, I note that the district court may not have had jurisdiction for another reason, that is, failure to exhaust administrative remedies. It appears from the record that neither the shipper (GLC) nor the carrier (KCS) filed a petition for reconsideration before the ICC. Denial or other disposition of a timely petition

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2. The Interstate Commerce Act was revised and recodified by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. The legislative history clearly indicates that the revision and recodification was not intended to make any substantive changes but only to modernize some of the Act's archaic language. *E.g., Chicago & N.W. Transp. Co. v. Atchison, T. & S.F. Ry.*, 609 F.2d 1221, 1222 n.1 (7th Cir. 1979), *citing* H.R. REP. NO. 95-1395, 95th Cong., 2d Sess. 1, 4, 9-10, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 3009, 3013, 3018.

3. 49 U.S.C. § 16(2) (now revised and codified at 49 U.S.C. § 11705) provides:

> Proceedings in courts to enforce orders; costs; attorney's fees. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

for reconsideration may well be a jurisdictional prerequisite to judicial review in a direct review proceeding. "Section 17(9) [renumbered as § 17(10), recodified as § 10325] provides that after an application for rehearing, reargument, or reconsideration has been denied or otherwise disposed of, a suit may be brought to enforce, enjoin, suspend, or set aside the Commission decision, order, or requirement." *Atlantic, supra,* 383 U.S. at 582-83 (footnote omitted); *see United States v. Southern Ry.,* 364 F.2d 86, 92-93 (5th Cir. 1966), *cert. denied,* 386 U.S. 1031 (1967); *Southern Ry. v. United States,* 412 F. Supp. 1122, 1134-35 & n.31 (D.D.C. 1976); *but see Resort Bus Lines, Inc. v. ICC,* 264 F. Supp. 742, 745 & n.6 (S.D.N.Y. 1967). New § 17(9) suggests, however, that a petition for reconsideration may not be necessary, at least in rail carrier proceedings,[4] because petitions for reconsideration are essentially discretionary and based upon allegations of material error, new evidence, or substantially changed circumstances, 49 U.S.C. § 17(9)(g) (now revised and recodified at 49 U.S.C. § 10327(g)). *See* ICC General Rules of Practice, 49 C.F.R. § 1100.98 (Rail appellate procedures, Rule 98) (1979) (also reprinted in 49 U.S.C.A. Appendix).

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4. 49 U.S.C. § 17(9)(h) (now revised and codified at 49 U.S.C. § 10327(i)) provides:

> Notwithstanding any other provision of this Act, any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall be final on the date on which it is served. A civil action to enforce, enjoin, suspend, or set aside such a decision, order, or requirement, in whole or in part, may be brought after such date in a court of the United States pursuant to the provisions of law which are applicable to suits to enforce, enjoin, suspend, or set aside orders of the Commission.

49 U.S.C. § 10327(i) provides:

> Notwithstanding this subtitle, an action of the Commission under this section and an action of a designated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

I agree that the district court was the appropriate court in which to review the order of the ICC at issue. The district court as the referring court has exclusive jurisdiction to review ICC orders from referrals under the primary jurisdiction doctrine. 28 U.S.C. § 1336(b); *see, e.g., Atlantic, supra,* 383 U.S. at 580; *Southern Pacific Transportation Co. v. United States,* 505 F.2d 1252, 1254-55 (Ct. Cl. 1974); *Keller Industries, Inc. v. United States,* 449 F.2d 163, 166-67 (5th Cir. 1971); *McLean Trucking Co. v. United States,* 181 Ct. Cl. 170, 387 F.2d 657, 659-61 (1967); *see also* S. REP. NO. 1394, 88th Cong., 2d Sess. 2, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 3235. *Compare Pennsylvania R.R. v. United States,* 363 U.S. 202, 205 (1960) (the holding in this case prompted the amendment of § 1336). The action was initially filed in district court by the carrier to recover undercharges; the shipper filed a counterclaim for overcharges. Because the action raised questions within the primary jurisdiction of the ICC, the district court correctly referred the issues to the ICC. *E.g., United States v. Western Pacific R.R.,* 352 U.S. 59, 63-64 (1956). "When that occurs, the court ordering the reference of such issues to the Commission has exclusive jurisdiction of any civil action to enforce, enjoin, suspend, set aside, or annul a Commission order arising out of the referral. . . ." *Atlantic, supra,* 383 U.S. at 580. In addition, as noted by the concurring opinion, the ICC order at issue was basically an order for the payment of money and as such subject to judicial review by the district court. 28 U.S.C. § 1336(a);[5] *United States v. ICC,* 337

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5. 28 U.S.C. § 1336(a) provides:

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.

U.S. 426, 442 (1949); *Aluminum Co. of America v. United States*, 553 F.2d 1268, 1269-70 (D.C. Cir. 1977) (per curiam).

In my view, however, the shipper's motion for summary judgment, which was granted by the district court, was either an action to set aside the ICC order finding that the higher specific commodity rates, as modified by the ICC, were applicable to the shipments at issue or an action challenging the adequacy of the reparations award (to the extent the carrier recovered less than it demanded). In either case, judicial review was available only in a direct review proceeding (under old § 17(9) or new § 17 (10) of the Act), and not in an action for enforcement under § 16(2). In the absence of a reparations award, there is nothing upon which to base an enforcement action, *see Atlantic, supra*, 383 U.S. at 587; *United States v. ICC, supra*, 337 U.S. at 439-41, and a shipper cannot challenge the adequacy of a reparations award in an enforcement action, *see Atlantic, supra*, 383 U.S. at 587, *citing Baltimore & Ohio R.R. v. Brady*, 288 U.S. 448, 457-58 (1933); *D. L. Piazza Co. v. West Coast Line*, 210 F.2d 947, 949 (2d Cir.), *cert. denied*, 348 U.S. 839 (1954).

The characterization of the action below as a direct review proceeding and not an enforcement action is critical because, although both involve "orders for the payment of money," only § 16(2) actions for the *enforcement* of orders for the payment of money are brought as ordinary civil actions. 49 U.S.C. § 16(2); *Atlantic, supra*, 383 U.S. at 585. In contrast, direct review proceedings are distinct proceedings for judicial review and have special procedural requirements, in particular that such actions be brought by or against the United States, 28 U.S.C. § 2322. Originally, injunctive relief required a three-judge district court, 28 U.S.C. § 2325, with direct review to the Supreme

Court under 28 U.S.C. § 1253. However, §§ 2324-25 were repealed in 1975, Act of Jan. 2, 1975, § 7, Pub. L. No. 93-584, 88 Stat. 1918, and judicial review of orders other than for the payment of money or to enforce ICC orders is now in the courts of appeal, like review of other administrative agencies, with discretionary review by writ of certiorari in the Supreme Court. 28 U.S.C. §§ 1254 (writ of certiorari), 2341 *et seq.* (Judicial Review Act of 1950 (Hobbs Act)); *see generally* H.R. REP. NO. 93-1569, 93d Cong., 1st Sess. 1, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7025, 7034-36 (report of Department of Justice).

The action below was, in my opinion, a direct review proceeding to review an adverse reparations order. The fact that the ICC order under attack was one relating to the payment of money and thus in sustance one for the payment of money meant that the order was "not of sufficient public importance to justify the accelerated judicial review procedure [the three-judge district court and direct review by the Supreme Court]." *United States v. ICC, supra,* 337 U.S. at 442. "Thus, though the procedures set out in 28 U.S.C. §§ 2321-25 (1964 ed.) otherwise govern § 17(9) proceedings to review such orders, § 2325 is not applicable and the matter may be adjudicated by a single judge." *Atlantic, supra,* 383 U.S. at 585. The provision requiring a three-judge district court (now repealed, *see* discussion *supra*) does not apply to judicial review of adverse reparations orders, but the other provisions, including that requiring the action be brought against the United States, are applicable. Moreover, a reviewing court "may not formally set aside the Commission's order in an action in which neither the Commission nor the United States is a party." *Atlantic, supra,* 383 U.S. at 549.

In response to the argument that an action to set aside an order for the payment of money should be treated exactly like an action to enforce an order for the payment of money, I note that the Supreme Court in the *Atlantic* case addressed a similar argument. In that case the ICC resisted allowing a carrier to bring a direct review proceeding as a cross-action to the shipper's enforcement action. The ICC argued that "reparation orders respecting past rates are not of sufficient general importance to require their defense by the United States and the Commission, and the direct review proceeding should not be permitted regardless of the court in which it is brought." *Atlantic, supra,* 383 U.S. at 605. The Supreme Court stated that this was apparently not the view of Congress and cited the 1964 amendments which placed jurisdiction and venue of the direct review proceeding following reference to the ICC under the primary jurisdiction doctrine in the referring court, 28 U.S.C. §§ 1336 (b), 1398(b), in the referring court and not as an incident of the original action. *Atlantic, supra,* 383 U.S. at 605-06. Thus, an action for direct review of an ICC order, which must be brought against the United States, may involve an order "for the payment of money." Apparently only actions to enforce an order for the payment of money pursuant to § 16(2) of the Act do not require the United States as a party to the action.[6]

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6. *See generally Atlantic, supra,* 383 U.S. at 579-89, 605-06. In my view, actions to enforce orders for the payment of money are brought in the district courts, 28 U.S.C. § 1336(a), as any other civil action, 49 U.S.C. § 16(2); the United States need not be made a party. However, actions to enforce non-payment orders, although properly brought in the district courts, 28 U.S.C. § 1336(a), must be brought by or against the United States, 28 U.S.C. §§ 2321(b), 2322. Actions to set aside orders for the payment of money are brought in the district court and not the courts of appeals; such actions fall within the "Except as otherwise provided by an Act of Congress" language of 28 U.S.C. § 2321(a). 28 U.S.C. §§ 1336(a), 1336(b) (referral actions); *see also United*

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As noted by the Supreme Court, the statutory provisions controlling the availability of judicial review in this case are "an historical patchwork subject to more than one interpretation." *Atlantic, supra,* 383 U.S. at 586 n.4. Nonetheless, because the proceeding below was a direct review proceeding to set aside an ICC order for the payment of money and as such should have been brought against the United States, but was not, I would find that the district court lacked subject matter jurisdiction and would reverse the denial of the Rule 60(b)(4) motion.

BRIGHT, Circuit Judge, joining in the dissent.

I join in Judge McMillian's dissent. When the case was returned to the district court, the shipper moved for a summary judgment on its counterclaim, seeking a construction of the tariff inconsistent with the Commission's ruling. That motion triggered the statutory procedures for review of an ICC order, which require that the United States be joined. 28 U.S.C. § 2322 (1976). The statutes preclude a federal trial judge from making a tariff interpretation without complying with the procedures mandated by Congress; thus, such ruling amounts to a nullity.

In *Schwartz v. Bowman,* 244 F. Supp. 51 (S.D.N.Y. 1965), *aff'd sub nom. Annenberg v. Alleghany Corp.,* 360 F.2d 211 (2d Cir.) (*per curiam*), *cert. denied,* 385 U.S. 921 (1966), the court appropriately observed:

Footnote continued—
States v. ICC, supra, 337 U.S. 426 (direct review of adverse reparations order before single-judge district court). Such an action must be brought by or against the United States, 28 U.S.C. §§ 2321(a), 2322. Finally, actions to set aside non-money orders are properly brought in the courts of appeals and by or against the United States, 28 U.S.C. §§ 2321(a), 2322, unless the underlying order was referred to the ICC, in which case the referring court has exclusive jurisdiction. 28 U.S.C. § 1336(b).

> If it can be established extrinsically that the practical effect of success on the merits by the party making a claim would be to invalidate the [ICC] order, [28 U.S.C. § 2322] applies and its requirements must be met. [*Id.* at 68 (citations omitted).]

The absence of the United States as a party was "a fatal jurisdictional defect." *Id.* at 68. Thus, the judgment was void.

Moreover, I find nothing in the record that indicates that the district court expressly or impliedly made a determination that it had jurisdiction to overrule the Commission's order construing the tariff in question. Neither party called the court's attention to the relevant statutory sections, 28 U.S.C. §§ 2321-23, and the district court apparently assumed it could overturn the Commission's ruling. I find nothing in the record to show that the district court considered whether it possessed jurisdiction to overrule the Commission solely on the shipper's motion. The jurisdictional issue did not surface until the Railway Co. brought its motion for relief from a void judgment under Fed. R. Civ. P. 60(b)(4). The district court then should have corrected its jurisdictional error and granted the motion. Accordingly, I, too, would reverse.

Judge Heaney joins me in the views expressed in this dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.